

A **MOHAMAD SANI SHARIF & SATU LAGI Iwn. MUHAMMAD
DANIAL AIMAN CHE OMAR
(SEORANG BUDAK YANG MENDAKWA MELALUI
IBU DAN WAKIL LITIGASINYA)**

B MAHKAMAH TINGGI MALAYA, TAIPING
ASMADI HUSSIN PK
[RAYUAN SIVIL NO: AB-12BNCvC-31-07-2018]
2 JANUARI 2019

C **GANTI RUGI:** Kecelakaan diri – Kuantum – Rayuan terhadap kuantum – Kecelakaan kepatahan tulang humerus, clavicle dan scapula – Sama ada kesan sampingan akibat kecederaan-kecederaan sepatutnya ditaksir bersama-sama kelumpuhan keseluruhan tangan kiri – Sama ada jumlah RM90,000 munasabah

D **GANTI RUGI:** Kecelakaan diri – Kehilangan keupayaan mencari pendapatan – Pra-syarat – Sama ada plaintif mesti mempunyai pendapatan atau terjamin akan mendapat pendapatan sebelum kemalangan – Plaintif seorang pelajar dan tidak bekerja semasa kemalangan – Sama ada penolakan tuntutan kehilangan keupayaan mencari pendapatan selaras dengan undang-undang – Akta Undang-undang Sivil 1956, s. 28A(2)(c)(i)

E Plaintif, seorang kanak-kanak, melalui wakil litigasinya, membawa tindakan di Mahkamah Sesyen terhadap defendan-defendan untuk ganti rugi, kos dan faedah akibat kecederaan dan kerugian serta kerosakan lain yang ditanggungnya dalam satu kemalangan jalan raya. Perbicaraan kes diteruskan atas isu kuantum sahaja setelah pihak-pihak mencapai persetujuan mengenai liabiliti di mana defendan-defendan dipertanggungkan 90% dan plaintif, 10%. Defendan-defendan merayu 'terhadap keseluruhan keputusan tersebut ke atas isu kuantum (ganti rugi am sahaja)'. Rayuan defendan-defendan terhad pada tiga item yang disenaraikan dalam memorandum rayuan terpinda iaitu:

F (i) *severe traumatic head injury with diffuse axonal injury and cerebral oedema;*

G (ii) *multiple scars over the neck, left shoulder, chest, left arm left hand, left leg, and scalp (multiple laceration over dorsal of left hand and multiple laceration wounds over the left shoulder and left anterior chest wall);* dan (iii) *left mid-shaft clavicle fracture, mid-shaft left humerus fracture, fracture body of the left scapula.* Defendan-defendan menghujahkan bahawa award yang diberi untuk item (i) dan (ii) terlampau tinggi, dan untuk ganti rugi am bawah item (iii), ketiga-tiga kecederaan tersebut, termasuk kesan sampingan akibat kecederaan-kecederaan tersebut sepatutnya ditaksir bersama-sama kecederaan kelumpuhan sepenuhnya tangan kiri plaintif. Plaintif pula memfailkan rayuan silang terhadap kuantum, menghujahkan bahawa undang-undang kes membenarkan plaintif yang tidak bekerja semasa kemalangan menuntut kehilangan keupayaan mencari pendapatan. Walau bagaimanapun, defendan-

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defendan menghujahkan bahawa tuntutan plaintif untuk kehilangan keupayaan mencari pendapatan tidak wajar dibenarkan kerana (i) tuntutan tersebut tidak diplidkan dalam pernyataan tuntutan plaintif; dan (ii) s. 28A(2)(c)(i) Akta Undang-undang Sivil 1956 ('Akta') menghalang seseorang yang tercedera daripada menuntut ganti rugi untuk kehilangan pendapatan atau kehilangan keupayaan mencari pendapatan, kecuali jika, sebelum kemalangan itu, dia memperoleh pendapatan.

Diputuskan (membenarkan sebahagian rayuan defendan-defendan terhadap kuantum; menolak rayuan silang plaintif):

- (1) Kecederaan kepatahan tulang *humerus*, *clavicle* dan *scapula* yang berada pada anggota atas badan seharusnya ditaksirkan bersama-sama dengan kelumpuhan keseluruhan tangan kiri kerana melibatkan fungsi anggota badan yang sama. Kesan sampingan akibat kepatahan tulang *clavicle*, *humerus* dan *scapula* ditenggelami oleh kelumpuhan sepenuhnya tangan kiri plaintif. Mengambil kira kuantum untuk *brachial plexus injury* dalam *Revised Compendium of Personal Injury Award* terkini, iaitu, antara RM50,000 hingga RM80,000, dan award untuk pemotongan tangan sehingga paras bahu ialah di antara RM90,000 hingga RM95,000 serta prinsip *overlapping*, didapati jumlah RM90,000 untuk kecederaan *left mid-shaft clavicle fracture*, *mid-shaft left humerus fracture*, *fracture body of the left scapula* dan *complete left brachial plexus injury* adalah munasabah. Jumlah tersebut dibenarkan untuk menggantikan award hakim bicara secara berasingan untuk kepatahan tulang *clavicle*, *humerus* dan *scapula* serta *brachial plexus injury*. (perenggan 18 & 20)
- (2) Kehilangan keupayaan mencari pendapatan adalah suatu ganti rugi am dan tuntutan jenis ini tidak perlu diplid secara khusus; cukup sekadar plaintif memplidkan bahawa dia menuntut ganti rugi am. Defendan-defendan, dalam notis rayuan mereka, merayu 'terhadap keseluruhan keputusan tersebut ke atas isu kuantum (ganti rugi am sahaja)'. Defendan-defendan terikat dengan notis rayuannya yang memberi hak kepada plaintif memfailkan rayuan silang terhadap isu tersebut tanpa perlu memfailkan notis rayuan secara berasingan. Oleh itu, bantahan awalan defendan-defendan berkenaan kegagalan memfailkan notis rayuan berasingan dan memplid tuntutan kehilangan keupayaan mencari pendapatan tidak berasas (perenggan 23, 25, 27 & 28)
- (3) Subseksyen s. 28A(2)(c)(i) Akta memperuntukkan 'damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured' sebelum plaintif dibenarkan menuntut ganti rugi kehilangan pendapatan masa depan. Jelas, menurut pra-syarat bawah s. 28A(2)(c) Akta, seseorang yang

- A menuntut kehilangan keupayaan mencari pendapatan mestilah mempunyai pendapatan atau setidak-tidaknya telah terjamin akan mendapat pendapatan sebelum kemalangan. Plaintiff, pada masa material, berumur 16 tahun, seorang pelajar dan tidak bekerja semasa kemalangan berlaku. Oleh itu, keputusan hakim bicara berkaitan penolakan tuntutan kehilangan keupayaan mencari pendapatan adalah selaras dengan undang-undang dan keputusan itu dikekalkan. (perenggan 30 & 42)

Kes-kes yang dirujuk:

- C *Amierul Hanif Mokhtar & Anor (plaintif merupakan seorang kanak-kanak dan menuntut melalui bapanya dan wakil litigasi plaintiff kedua) v. Tan Loo Yean* [2018] 1 PIR [33] (*tidak diikuti*)
Dirkje Pietermella Halma v. Mohd Noor Baharom & Ors [1990] 2 CLJ 167; [1990] 1 CLJ (Rep) 99 SC (*dirujuk*)
Enduro Basuki v. Adnan Anandan Abdullah & Anor And Another Case [2017] 1 LNS 1487 HC (*dirujuk*)
- D *Hari Bhadur Ghale v. PP* [2012] 7 CLJ 789 FC (*dirujuk*)
Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 8 CLJ 149 FC (*dirujuk*)
Ngooi Ku Siong & Anor v. Aidi Abdullah [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294 FC (*dibezakan*)
Sam Wun Hoong v. Kader Ibramshah [1981] 1 LNS 103 FC (*dirujuk*)
- E *Seah Yit Chen v. Singapore Bus Service (1978) Ltd & Ors* [1990] 1 LNS 56 (*dirujuk*)
Sumarni v. Yow Bing Kwong & Anor [2008] 3 CLJ 489 CA (*dibezakan*)
Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441 SC (*dirujuk*)
Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC (*dirujuk*)
- F *Thrimalai Palamiappan & Anor v. Mohd Masry Tukiman* [1986] 1 CLJ 347; [1986] CLJ (Rep) 756 HC (*dirujuk*)
Topaiwah v. Salleh [1968] 1 LNS 161 FC (*dirujuk*)
Yang Yap Fong & Anor v. Leong Pek Hoon & Anor [1987] 1 CLJ 377; [1987] CLJ (Rep) 419 SC (*dirujuk*)
- G **Perundangan yang dirujuk:**
Civil Law Act 1956, s. 28A(2)(c)(i)
Rules of Court 2012, O. 55 r. 3
Bagi pihak perayu-perayu/defendan-defendan - Subashini Gunasegran & Baljeet Kaur Harbhajan Singh; T/n VT Singam, D Gunasegaran & Co
- H *Bagi pihak responden/plaintif - Ooi Kim Ing; T/n Manjit & Co*
Dilaporkan oleh S Barathi

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PENGHAKIMAN

A

Asmadi Hussin PK:**Rayuan**

[1] Di dalam alasan penghakiman ini, pihak-pihak akan dirujuk sebagaimana kedudukan mereka di Mahkamah Sesyen.

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[2] Plaintiff (responden di dalam rayuan ini), pada masa yang material seorang kanak-kanak, melalui wakil litigasinya telah membawa tindakan Mahkamah Sesyen Taiping No. Kes AB-A53KJ-144-10-2017 (kes itu) terhadap defendan-defendan (perayu-perayu di sini) untuk mendapatkan ganti rugi, kos dan faedah akibat kecederaan dan kerugian serta kerosakan lain yang ditanggungnya di dalam satu kemalangan jalan raya. Kemalangan itu berlaku pada 9 Oktober 2016 jam lebih kurang 8.05 malam di KM 4, Jalan Sempadan, Sungai Bakau, Parit Buntar, Perak di antara motosikal nombor pendaftaran PEW 3933 yang ditunggang oleh plaintiff dan motokar nombor pendaftaran WLT 4453 (motokar itu) yang dipandu oleh defendan pertama. Defendan kedua adalah pemilik motokar itu.

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[3] Perbicaraan kes itu diteruskan atas isu kuantum sahaja setelah pihak-pihak mencapai persetujuan mengenai liabiliti di mana defendan-defendan bertanggung 90%, manakala plaintiff bertanggung 10%. Plaintiff telah memanggil seramai dua orang saksi, iaitu plaintiff sendiri (SP1) dan wakil litigasinya, Che Norlia binti Hapipah (SP2). SP2 adalah ibu kandung plaintiff.

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[4] Pada 17 Julai 2018, Hakim Mahkamah Sesyen Taiping yang bijaksana (hakim bicara) telah memberikan keputusannya mengenai kuantum.

[5] Setakat yang relevan kepada rayuan ini, ganti rugi am yang diputuskan oleh Hakim Mahkamah Sesyen (hakim bicara) adalah seperti berikut:

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Bil	Jenis kecederaan/tuntutan	Award
1.	Left 1st rib fracture with left lung contusion	RM 9,000
2.	Severe traumatic head injury with diffuse axonal injury and cerebral oedema	RM100,000
3.	Multiple scars over the neck, left shoulder, chest, left arm left hand, left leg, and scalp (multiple laceration over dorsal of left hand and multiple laceration wounds over the left shoulder and left anterior chest wall), extensive degloving injury over the anterior chest wall	RM 45,000
4.	Left mid-shaft clavicle fracture, mid-shaft left humerus fracture, fracture body of the left scapula	RM 55,000

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A	5.	Complete left brachial plexus palsy, no movement in the left upper limb from the shoulders to the fingers	RM 70,000
	6.	Closed fracture neck of proximal left ring finger	RM 9,000
B	7.	Splenic injury with hemoperitoneum	RM 11,000
	8.	Pain and suffering after future surgeries (scar revision for the neck scar and split skin grafting for the wounds on the left ring finger and left little finger)	RM 5,000
C	9.	Loss of earning capacity	Ditolak

[6] Melalui notis rayuan bertarikh 20 Julai 2018 (lihat ms. 8-9 rekod rayuan (RR) perayu-perayu merayu “terhadap keseluruhan keputusan tersebut ke atas isu kuantum (ganti rugi am sahaja)”.

[7] Melalui notis rayuan balas bertarikh 20 Ogos 2018 (lihat ms. 6-7 RR responden), responden membuat rayuan silang “ke atas kuantum (loss of earning capacity) patut diubahkan setakat dan atas alasan yang dinyatakan kemudian daripada ini:

1. Tuan Hakim Mahkamah Sesyen Taiping telah tersilap dari segi fakta dan undang-undang apabila menolak tuntutan Plaintiff ke atas loss of earning capacity.

2. Tuan Hakim Mahkamah Sesyen Taiping telah tersilap dari segi fakta dan undang-undang apabila gagal mengambil kira keterangan-keterangan plaintiff dan ibu plaintiff, laporan-laporan perubatan dan kesemua laporan pakar, undang-undang dan kes-kes yang berpihak kepada plaintiff yang diujahkan oleh plaintiff sebelum mencapai keputusannya.

Memorandum Rayuan Defendan-Defendan

[8] Bagi tujuan rayuan ini, mahkamah ini hanya memetik bahagian yang relevan di dalam memorandum rayuan terpinda defendan-defendan (lihat ms. 1-4 RR tambahan) bertarikh 19 Ogos 2018 yang dibaca seperti berikut:

(i) Tuan Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau telah membenarkan award sebanyak RM100,000 untuk kecederaan kepala plaintiff walaupun tidak ada sebarang laporan perubatan dan/atau laporan pakar yang menyatakan bahawa plaintiff mengalami kecacatan (disabilities) akibat daripada kecederaan kepala tersebut.

(ii) Tuan Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau telah membenarkan award sebanyak RM100,000 untuk kecederaan kepala plaintiff dengan merujuk kepada autoriti-autoriti untuk kecederaan kepala yang juga mengambil kira

- kecacatan yang serius dan kekal. Oleh itu, Tuan Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta di dalam membenarkan award sebanyak RM100,000 tersebut. A
- (iii) Tuan Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau telah membenarkan award sebanyak RM45,000 untuk kecederaan *multiple scars* dan *degloving injury* yang adalah amat keterlaluan dan tidak munasabah. B
- (iv) Tuan Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau mengawardkan sejumlah RM125,000 untuk kecederaan di tangan kiri plaintiff iaitu sebanyak RM70,000 untuk *complete left brachial plexus injury* dan RM55,000 untuk *left mid-shaft clavicle fracture*, *left mid-shaft humerus fracture* dan *left fracture body of scapula*. C
- (v) Tuan Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau telah memberikan award yang berasingan untuk kecederaan-kecederaan *left mid-shaft clavicle fracture*, *left mid-shaft humerus fracture* dan *left fracture body of scapula*, walaupun kecederaan-kecederaan ini harus diambil kira sekali gus dengan award yang diberikan untuk kelumpuhan tangan kiri yang dialami plaintiff. D
- (vi) Tuan Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau gagal menimbangkan bahawa hanya satu sahaja award yang seharusnya diberikan untuk kelumpuhan di tangan kiri plaintiff (*complete left brachial plexus injury*) yang termasuk *left mid-shaft clavicle fracture*, *left mid-shaft humerus fracture* dan *left fracture body of scapula* memandangkan *pain and suffering* dari kecederaan-kecederaan ini adalah tertumpu di tangan kiri sahaja. E F
- (vii) Tuan Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau mencapai pendapat bahawa award yang berasingan perlu diberikan untuk kelumpuhan di tangan kiri plaintiff (*complete left brachial plexus injury*) dan untuk keretakan tulang di lengan kiri plaintiff iaitu *left mid-shaft clavicle fracture*, *left mid-shaft humerus fracture* dan *left fracture body of scapula* tanpa memberikan sebarang alasan mengapa award-award yang berasingan harus diberikan. G
- (viii) Tuan Hakim yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila beliau gagal untuk menilai dan/atau mempertimbangkan perkara-perkara tersebut sebelum mencapai keputusannya berkenaan kuantum (ganti rugi am) di dalam kes ini: H
- (a) Keterangan-keterangan yang diberikan semasa perbicaraan. I
- (b) Ekshibit-ekshibit yang berkaitan.
- (c) Penghujahan oleh peguam bagi defendan-defendan.

- A (ix) Oleh yang demikian, defendan-defendan memohon dengan rendah diri agar penghakiman yang diberikan oleh Tuan Hakim yang bijaksana pada 17 Julai 2018 berkenaan dengan isu liabiliti dan kuantum diketepikan dan/atau diubah dan/atau perintah seterusnya diberikan sepertimana yang mahkamah yang mulia ini fikirkan patut, adil dan munasabah.
- B

[9] Di dalam hujahan bertulisnya peguam cara defendan-defendan mengehendkan rayuannya ke atas tiga item yang disenaraikan di dalam memorandum rayuan terpinda, iaitu:

- C (i) Severe traumatic head injury with diffuse axonal injury and cerebral oedema
- (ii) Multiple scars over the neck, left shoulder, chest, left arm left hand, left leg, and scalp (multiple laceration over dorsal of left hand and multiple laceration wounds over the left shoulder and left anterior chest wall), extensive degloving injury over the anterior chest wall
- D (iii) Left mid-shaft clavicle fracture, mid-shaft left humerus fracture, fracture body of the left scapula

- [10] Bagi ganti rugi am di bawah item (i) dan (ii) di atas, peguam cara defendan-defendan menghujahkan bahawa award yang diberikan oleh hakim bicara adalah terlampau tinggi, sementara bagi ganti rugi am di item (iii), ketiga-tiga kecederaan itu, termasuk kesan sampingan akibat kecederaan-kecederaan tersebut sepatutnya ditaksirkan bersama kecederaan *complete left brachial plexus injury*/kelumpuhan sepenuhnya tangan kiri plaintif.
- E

Rayuan Silang Plaintif

- F [11] Peguam cara plaintif menghujahkan bahawa undang-undang kes membenarkan plaintif yang tidak bekerja semasa kemalangan untuk menuntut kehilangan keupayaan mencari pendapatan (loss of earning capacity) asalkan terdapat keterangan yang menunjukkan terdapatnya risiko bahawa plaintif tidak boleh lagi mencari pendapatan di masa hadapan. Di dalam kes ini, tangan kiri plaintif telah mengalami kelumpuhan sepenuhnya. Kecacatan ini telah menjejaskan peluang plaintif untuk bekerja selamalamanya. Kes-kes *Sumarni v. Yong Bing Kwong & Anor* [2008] 3 CLJ 489; [2008] 1 AMR 259, *Yang Yap Fong & Anor v. Leong Pek Hoon & Anor* [1987] 1 CLJ 377; [1987] CLJ (Rep) 419, *Ngooi Ku Siong & Anor v. Aidi Abdullah* [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294; [1985] 1 MLJ 30 dan *Amierul Hanif bin Mokhtar & Anor (plaintif merupakan seorang kanak-kanak dan menuntut melalui bapanya dan wakil litigasi plaintif kedua) v. Tan Loo Yean* [2018] 1 PIR [33] telah dijadikan sandaran bagi menguatkan hujahan tersebut.
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- H

- [12] Bagi pihak defendan-defendan pula, adalah dihujahkan oleh peguam cara terpelajar bahawa tuntutan plaintif untuk kehilangan keupayaan mencari pendapatan tidak wajar dibenarkan atas dua alasan, iaitu:
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- (a) ia tidak diplidkan di dalam pernyataan tuntutan plaintif; dan A
- (b) seksyen 28A(2)(c)(i) Akta Undang-Undang Sivil 1956 menghalang seseorang yang tercedera daripada menuntut ganti rugi untuk kehilangan pendapatan atau kehilangan keupayaan mencari pendapatan, kecuali jika sebelum kemalangan itu dia telah pun memperolehi pendapatan (receiving earning by its labour or other gainful activity before he was injured) – kes *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441; [1991] 1 MLJ 42 dijadikan nas. B

Keputusan Mahkamah Ini

[13] Pada 30 November 2018, setelah menghalusi rekod rayuan dan penghujahan bertulis dan lisan kedua-dua belah pihak, mahkamah ini membenarkan sebahagian rayuan defendan-defendan terhadap kuantum dan menolak rayuan silang plaintif. Bagi rayuan defendan-defendan terhadap kuantum, mahkamah ini meminda award untuk kecederaan kepala (head injury) daripada RM100,000 kepada RM50,000 dan kecederaan *left mid-shaft clavicle fracture, mid-shaft left humerus fracture, fracture body of the left scapula* diputuskan perlu ditaksirkan bersama-sama dengan kecederaan *complete left brachial plexus injury* di mana award sebanyak RM90,000 dibenarkan bagi kesemua kecederaan tersebut dengan mengambil kira pertindihan (overlapping). Award untuk *multiple scars over the neck, left shoulder, chest, left arm left hand, left leg, and scalp* (multiple laceration over dorsal of left hand and multiple laceration wounds over the left shoulder and left anterior chest wall), *extensive degloving injury over the anterior chest wall* dikekalkan. C D E

[14] Plaintif yang terkilan kini merayu ke Mahkamah Rayuan Malaysia melalui notis rayuan bertarikh 21 Disember 2018 terhadap sebahagian keputusan mahkamah ini bersangkutan: F

- (a) award untuk kecederaan *left mid-shaft clavicle fracture, mid-shaft left humerus fracture, fracture body of the left scapula* ditaksirkan bersama-sama dengan kecederaan *complete left brachial plexus injury*; dan
- (b) penolakan tuntutan kehilangan keupayaan mencari pendapatan. G

[15] Pihak defendan-defendan tidak memfailkan apa-apa rayuan terhadap keputusan mahkamah ini.

[16] Berikut diperturunkan alasan-alasan kepada keputusan mahkamah ini, terhad kepada isu yang dirayu oleh plaintif ke Mahkamah Rayuan Malaysia sahaja. H

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A **Alasan Kepada Keputusan Mahkamah Ini**

(i) Sama Ada Kecederaan Left Mid-shaft Clavicle Fracture, Mid-shaft Left Humerus Fracture, Fracture Body Of The Left Scapula Wajar Ditaksirkan Bersama-sama Dengan Kecederaan Complete Left Brachial Plexus Injury

B [17] Mengenai kecederaan *complete left brachial plexus injury*, Dr. T. Moses daripada Dr. T. Moses Orthopaedic Specialist Sdn Bhd, pakar perunding orthopaedic dan pembedahan trauma yang dilantik oleh peguam cara plaintif untuk menyediakan laporan pakar plaintif menyatakan, antara lain, seperti berikut:

C (g) The Brachial Plexus is made up of five nerve roots namely C (cervical) 5, C6, C7, C8 and T(Thoracic)1, **starting from the neck running into the chest, arm, and hand. This control the functions of the upper limbs.**

D (h) It is now nine months from the time of injury and four months from the time of neurotisation procedure at University Malaya Medical Centre, There has been absolutely no recovery of the left Brachial Plexus Injury. With absolutely no recovery at all after six months from the time of the injury and three months after the procedure it is considered permanent and hence to recovery of the left upper limb is expected. Thus, the complete paralysis of the left upper limb is permanent. (penekanan ditambah)

E [18] Laporan pakar yang dipetik di atas menunjukkan hubung kait di antara kecederaan *complete left brachial plexus* dengan *upper limb* (anggota atas badan) yang terdiri daripada tangan kiri dan kanan. Oleh itu kecederaan kepatahan tulang *humerus*, *clavicle* dan *scapula* yang berada pada anggota atas badan (*upper limb*) pada hemat mahkamah ini seharusnya ditaksirkan bersama-sama dengan kelumpuhan keseluruhan tangan kiri (*complete left brachial plexus injury*) kerana ia melibatkan fungsi anggota badan yang sama. Hakim bicara telah gagal mempertimbangkan kedudukan ini semasa membuat award bagi kecederaan-kecederaan tersebut. Lebih parah lagi hakim bicara langsung tidak mempertimbangkan prinsip pertindihan (*overlapping*). Kegagalan hakim bicara tersebut terjumlah kepada salah arahan yang serius melalui tiada arah diri (*misdirection by way of non-direction*) yang mewajarkan campur tangan mahkamah ini sebagai mahkamah yang mendengar rayuan kerana award yang diberikan ditaksirkan atas prinsip yang salah (*Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLRA 58; [1968] 1 MLJ 284; *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; [1986] 1 MLRA 1983; [1985] 2 MLJ 22). Di kesempatan ini, sebagai sokongan, mahkamah ini ingin merujuk kepada kes *Seah Yit Chen v. Singapore Bus Service (1978) Ltd & Ors* [1990] 1 LNS 56; [1990] 3 MLJ 144 yang, antara lain, memutuskan seperti berikut:

I

(1) In assessing damages, a court may either adopt a global approach and award a total amount to cover all injuries and claims; or a component approach and award separate amounts for each head of damage, which are then totalled; or even a mixed approach and award separate amounts for each head of damage which are then totalled and matched against a global award.

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(2) The approach to be followed must necessarily depend on the facts of each case, bearing in mind the need to avoid overlapping. When the injuries sustained are related to the same part or function of the body, there should only be one award of damages, without any risk of overlapping: where the injuries sustained are to different parts of the body and affect different functions, as in the case where the plaintiff has sustained injuries to the knee and to the spine, it would be appropriate to make a separate award for each head of damage. In such cases, however, care would still have to be taken to avoid a further 'sub-itemising' of a head of damage or injury.

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[19] Di dalam kes *Thrimalai Palamiappan & Anor v. Mohd Masry Tukiman* [1986] 1 CLJ 347; [1986] CLJ (Rep) 756 diputuskan seperti berikut:

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Having reached the journey's end, I feel impelled to state once again that in cases of multiple injuries, it is not the correct approach to assess what each would be worth separately and then to insist upon payment of the global figure so arrived at. The end result of such an exercise is evident in the present case where the global award claimed almost approached what a court would award to a paraplegic. Can we ignore the fact that notwithstanding the lacerations to various areas of the right leg, the leg itself is no longer there since it has been amputated? At the risk of repetition therefore I would state once again that where pain and suffering, loss of amenities, and discomfort to a plaintiff result from multiple injuries, it would be wrong to value each injury as though the others had not taken place and then to add all the figure together.

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[20] Kesan sampingan akibat kepatahan tulang clavicle, humerus dan scapula telah ditenggelami oleh kelumpuhan sepenuhnya tangan kiri plaintiff. Dengan mengambil kira kuantum untuk *brachial plexus injury* sebagaimana dinyatakan di dalam Revised Compendium of Personal Injury Award terkini (6 Julai 2018) ialah di antara RM50,000 hingga RM80,000 dan award untuk pemotongan tangan sehingga paras bahu ialah di antara RM90,000 hingga RM95,000 serta prinsip *overlapping*, mahkamah ini berpendapat jumlah RM90,000 untuk kecederaan *left mid-shaft clavicle fracture, mid-shaft left humerus fracture, fracture body of the left scapula* dan *complete left brachial plexus injury* adalah munasabah. Jumlah itu dengan ini dibenarkan bagi menggantikan award yang diberikan oleh hakim bicara secara berasingan untuk kepatahan tulang clavicle, humerus dan scapula serta *brachial plexus injury*.

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A (ii) *Kehilangan Keupayaan Mencari Pendapatan*

[21] Terlebih dahulu, perlu diputuskan bantahan awal peguam cara defendan-defendan mengenai keupayaan plaintif membuat rayuan silang bersabit penolakan tuntutan kehilangan keupayaan mencari pendapatan.

- B [22] Pertamanya, diujahkan oleh peguam cara defendan-defendan bahawa plaintif sepatutnya memfailkan notis rayuan berasingan terhadap penolakan tuntutan kehilangan keupayaan mencari pendapatan dan tidak boleh bergantung kepada rayuan defendan-defendan ke atas kuantum ganti rugi am atas alasan defendan-defendan tidak merayu berkait item ini – kes *Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors* [2016] 8 CLJ 149
- C dirujuk sebagai sokongan.

- D [23] Setelah menghadam hujahan berkenaan isu ini, mahkamah ini memutuskan bantahan awal peguam cara defendan-defendan ini tidak bermerit. Mahkamah ini mendapati defendan-defendan di dalam notis rayuannya merayu “terhadap keseluruhan keputusan tersebut ke atas isu kuantum (ganti rugi am sahaja)”. Ini bermakna defendan-defendan merayu terhadap keseluruhan keputusan hakim bicara mengenai ganti rugi am, termasuk yang ditolak oleh hakim bicara. Sepatutnya, defendan-defendan menyatakan dengan jelas rayuannya terhadap ganti rugi am tidak termasuk penolakan tuntutan untuk kehilangan keupayaan mencari pendapatan bagi
- E memberi notis kepada plaintif bahawa sekiranya plaintif terkilan dengan penolakan tersebut, plaintif perlu memfailkan notis rayuan berasingan. Aturan 55 k. 3 Kaedah-kaedah Mahkamah 2012 memperuntukkan seperti berikut:

F **3. Notice of appeal against a decision made after trial (O. 55 r. 3)**

- (1) A notice of appeal against a decision made after trial shall substantially be in Form 111 and shall be filed in the Court from which the decision is appealed from.
- G (2) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only, and what part, of the judgment or order is complained of.

[24] Sepatutnya peguam cara defendan-defendan menyatakan dengan jelas di dalam notis rayuannya bahawa rayuan terhadap kuantum ganti rugi am itu tidak termasuk tuntutan kehilangan keupayaan mencari pendapatan.

- H [25] Meskipun di dalam memorandum rayuan defendan-defendan tidak memasukkan isu ini sebagai sebahagian daripada rayuan defendan-defendan, mahkamah ini berpendapat defendan-defendan terikat dengan notis rayuannya yang menyatakan pihaknya merayu terhadap keseluruhan keputusan hakim bicara mengenai ganti rugi am yang memberikan hak kepada plaintif memfailkan rayuan silang terhadap isu ini tanpa perlu memfailkan notis rayuan secara berasingan.
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[26] Adalah menjadi prinsip undang-undang mantap bahawa kehilangan keupayaan mencari pendapatan merupakan suatu ganti rugi am. Di dalam kes *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 LNS 103; [1981] 1 MLJ 295, Mahkamah Persekutuan memutuskan seperti berikut:

In an action for personal injuries, there are two classes for damages which have to be considered - special damage which has to be specially pleaded and general damage which need not be specially pleaded. In both classes of damages, the burden of proof based on the balance of probabilities in the evidence, lies on the plaintiff. Special damage consists out-of-pocket expenses, such as hospital bills and actual loss of earning during period of total incapacity, and is generally capable of substantially exact calculation.

General damage comprises damage for pain and suffering, loss of amenities and the like which the law implies, and in certain cases where the injuries suffered are such as to lead to continuing or permanent disability, it includes future loss of earnings and loss of earning capacity. Under the heading of pain and suffering and loss of amenities, the quantum is mainly assessed on the nature of injuries sustained and the period of hospitalisation, and in arriving at a figure, the court is guided by previous awards in cases involving similar type of injuries with allowances being given as to the plaintiff's age, marital status, his special position socially or in business, depreciation or appreciation of money value and other relevant circumstances. *As regards loss of future earning and future loss of earning capacity, although such loss can be implied in appropriate cases, the award should be nominal one, unless the plaintiff can prove such future loss is in fact sufficiently severe to warrant a substantial award.* Further, such implied loss can be rebutted by the evidence, and if the evidence does in fact disclose no future loss of earning or loss of earning capacity, no award need be given under these headings. (penekanan ditambah)

[27] Sebagai ganti rugi am, tuntutan jenis ini tidak perlu diplidkan secara khusus, cukup sekadar plaintiff memplidkan bahawa dia menuntut ganti rugi am (lihat *Enduro Basuki v. Adnan Anandan bin Abdullah & Anor & Another Case* [2017] 1 LNS 1487; [2017] MLJU 1467). Tuntutan untuk ganti rugi am (ditulis sebagai ganti rugi umum) diplidkan di perenggan 13(b) penyata tuntutan plaintiff (lihat ms. 17 RR). Plaintiff telah mematuhi kehendak undang-undang.

[28] Oleh itu, bantahan awal peguam cara defendan-defendan berkenaan kegagalan memfailkan notis rayuan berasingan dan memplidkan tuntutan kehilangan keupayaan mencari pendapatan diputuskan adalah tidak berasas. Sekarang, mahkamah ini akan menghalusi merit rayuan silang plaintiff mengenai isu ini.

[29] Seksyen 28A Akta Undang-Undang Sivil 1956 memperuntukkan seperti berikut:

- A (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account:
- (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;
- B (b) any pension or gratuity, which has been or will or may be paid as result of the personal injury; or
- (c) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.
- C (2) In assessing damages under this section:
- (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;
- D (b) if the plaintiff's expectation of life has been reduced by the injury, the Court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;
- (c) in awarding damages for loss of future earnings the Court shall take into account:
- E (i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, *damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;*
- F (ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;
- G (iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;
- H (d) in assessing damages for loss of future earnings the Court shall take into account that:
- (i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and
- I (ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years'

purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

(penekanan ditambah)

[30] Subseksyen 28A(2)(c)(i) memasukkan perkataan “damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured” sebelum seseorang plaintiff boleh menuntut ganti rugi kehilangan pendapatan masa depan. Adalah tidak dipertikaikan bahawa plaintiff pada masa yang material berumur 16 tahun dan merupakan seorang pelajar dan tidak bekerja semasa kemalangan itu berlaku.

[31] Peguam cara plaintiff, meskipun maklum akan peruntukan statut di atas, tetapi masih bersandarkan kepada undang-undang kes yang telah dirujuk di perenggan [11] alasan penghakiman ini bagi memujuk mahkamah ini untuk membenarkan tuntutan kehilangan keupayaan mencari pendapatan.

[32] Rasanya, adalah perlu untuk mahkamah ini mengulas mengenai kes-kes yang dirujuk oleh peguam cara plaintiff di dalam menentukan sama ada kes-kes tersebut menyokong hujahan dan pendirian peguam cara plaintiff bahawa seorang yang tidak bekerja boleh diberikan award untuk kehilangan keupayaan mencari pendapatan.

[33] Di dalam kes *Sumarni v. Yow Bing Kwong & Anor (supra)*, plaintiff merupakan seorang warganegara Indonesia berumur 27 tahun yang bekerja sebagai babu (maid). Sebelum kemalangan, plaintiff mempunyai permit kerja. Enam bulan selepas kemalangan, majikannya tidak memperbaharui permit kerja plaintiff atas alasan bahawa beliau tidak boleh lagi bekerja sebagai babu. Tuntutan beliau untuk kehilangan pendapatan ditolak atas alasan beliau gagal membuktikan bahawa beliau berada di dalam keadaan kesihatan yang baik sebelum kemalangan sebagaimana kehendak s. 28A(2) Akta Undang-Undang Sivil 1956 serta ketiadaan bukti berkenaan ketidakmampuan fizikalnya untuk bekerja di masa hadapan. Namun, Mahkamah Rayuan memberikan award untuk kehilangan keupayaan mencari pendapatan. Yang jelas, plaintiff di dalam kes itu bekerja sebelum kemalangan, cuma gagal membuktikan ketidakupayaan bekerja di masa hadapan. Fakta kes *Sumarni v. Yow Bing Kwong & Anor (supra)* sama sekali berbeza dengan kes semasa.

[34] Kes *Ameirul Hanif bin Mokhtar & Anor (plaintif pertama merupakan seorang kanak-kanak dan menuntut melalui bapanya dan wakil litigasi plaintiff kedua) v. Tan Loo Yean (supra)* ialah keputusan Mahkamah Sesyen Seremban. Plaintiff di dalam kes itu seorang pelajar. Hakim Mahkamah Sesyen membenarkan RM10,000 sebagai ganti rugi am untuk kehilangan keupayaan mencari pendapatan. Sebagai keputusan Mahkamah Sesyen, kes itu tidak mempunyai apa-apa *persuasive value* kepada mahkamah ini, sementelah pula tidak mengikat mahkamah ini. Berdasarkan nota di dalam laporan kes itu,

A defendan di dalam kes itu tidak merayu. Hanya plaintif yang merayu di atas isu yang lain. Ketepatan keputusan Mahkamah Sesyen Seremban itu belum lagi teruji.

[35] Plaintif di dalam kes *Mohd Nur Akmal bin Yahya (suing by Yahya bin Eni, his father, next friend and litigation representative v. Rickson anak Akup & Anor (supra))* telah mendapat tawaran kerja daripada Malaysia Airport Berhad sebelum kemalangan. Plaintif di dalam kes itu telah diberikan tiket kapal terbang untuk datang ke Kuala Lumpur bagi melaporkan diri. Malangnya, kemalangan jalan raya yang menimpanya telah menghancurkan masa depannya. Dia tidak boleh lagi bekerja. Fakta kes itu berbeza jauh dengan fakta rayuan kes semasa ini.

[36] Plaintif di dalam kes *G. Krishna Ananda a/l Gopalakrishnan v. Muhammad Asyraf bin Yusof (supra)* juga mempunyai pekerjaan sebelum kemalangan. Selepas kemalangan, plaintif tidak hadir bekerja dan majikan telah mencari pengganti plaintif. Namun, plaintif mempunyai kemahiran sebagai pereka produk dan boleh mencari pekerjaan dengan mudah dengan skil yang dimilikinya. Ternyata fakta kes itu juga tidak menyokong hujahan peguam cara plaintif.

[37] Plaintif di dalam kes *Ngooi Ku Siong & Anor v. Aidil Abdullah* [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294; [1985] 1 MLJ 30 juga bekerja sebelum kemalangan. Beliau merupakan seorang pegawai pentadbiran (administrative officer) dalam tempoh percubaan dengan gaji RM400 sebulan. Terdapat skema gaji ditentukan selepas plaintif disahkan jawatan. Sebulan selepas melaporkan diri plaintif terlibat dengan kemalangan. Plaintif tidak meneruskan pekerjaan selepas kemalangan. Fakta kes itu juga jauh berbeza dengan fakta kes yang menjadi subjek rayuan semasa ini.

[38] Peguam cara plaintif bergantung keja kepada keputusan Mahkamah Agung di dalam kes *Yang Yap Fong & Anor v. Leong Pek Hoon & Anor* [1987] 1 CLJ 377; [1987] CLJ (Rep) 419. Mahkamah Agung di dalam menangani isu yang sama memutuskan seperti berikut:

The learned Judge did not give any reason for refusing to make any award for future loss of earning capacity although the record shows that the point was raised by counsel in their submissions. The probable ground appeared to be that the appellant who was nineteen at the date of hearing was not in any employment. But there was a prospect of getting one in the future soon after he qualified himself as a T.V. mechanic for which as stated earlier his father intended to send him as soon as he had sufficient funds. The principle applicable to future loss of earning capacity and its distinction with future loss of earnings are explicitly discussed in *Ngooi Ku Siong & Anor v. Aidi Abdullah* [1985] 1 MLJ 30 by the Federal Court. The proper test to be applied is whether some time in the future, due to the effect of the injuries sustained by him, the plaintiff will face a substantial risk of either losing his job or getting a less paid employment.

It does not matter whether the plaintiff was in employment or not at the time of the trial so long as the Court is satisfied from evidence that there is a real or substantial risk that his earning capacity will be affected in the future. *Moeliker v. A Reyrolle & Co Ltd* [1977] 1 All ER 9 and *Cook v. Consolidated Fisheries Ltd* [1977] ICR 635 639 are some of the cases in which a claim for loss of earning capacity was allowed to plaintiffs who were in employment and whose earnings were not affected at the material time.

However, in *Yang Salbiah & Anor v. Jamil bin Harun* [1981] 1 MLJ 292, the plaintiff, a seven-year old girl whose injuries sustained from an accident due to the fault of the respondent bus driver, was awarded compensation by the Federal Court for loss of earning capacity. The Court held that despite her tender age there was not the slightest doubt that had she not been injured and rendered totally incapable of gainful employment, she would have at the appropriate age, earned an income for herself.

In the light of the above, we are satisfied that the learned Judge erred in refusing to make any award for future loss of earning capacity. There is more than sufficient evidence of the likelihood that the appellant will be able to obtain employment and that in five to ten years time the injury to his right ankle will aggravate with osteoarthritis setting in and increasing as he grows older and will thereby affect his earning capacity.

There is some difficulty in computing a proper award. However, we would adopt the sum of \$200/- which the Judge had accepted as the appellant's lowest probable monthly earning. The appellant was nineteen at the date of trial and will be able to work till the age of fifty-five. His loss of earnings will likely commence in ten years time according to medical evidence, ie, when he reaches the age of twenty-nine. Taking away one-third or twelve years for life exigencies and the like, there is a balance of fourteen years purchase in his favour. His probable loss of earning is about \$100/- per month. The total loss of earning capacity for fourteen years will be \$11,880/- according to the Annuity Table. We would award a round sum of \$12,000/- for future loss of earning capacity. Although there is no appeal against the award of \$1,800/-, for the reasons we have stated earlier this award should be set aside. There is to be no interest for this award of \$12,000/-.

[39] Di dalam kes *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441; [1991] 1 MLJ 42 Mahkamah Agung telah mengulas kes *Yang Yap Fong & Anor v. Leong Pek Hoon & Anor* (*supra*). Mahkamah Agung memutuskan seperti berikut:

The crucial question raised before us is whether the plaintiff is eligible, as a pure question of law, for any award for loss of his earning capacity in consequence of the accident. Coming straight to a consideration of this basic issue, we feel that the answer to this question mainly depends on the interpretation of the Civil Law Act 1956 (Act 67) as amended in 1984.

At the outset we bear in mind when a matter of statutory interpretation is involved what Lord Hewart CJ said in *Spillers Ltd v. Cardiff (Borough) Assessment Committee and Pritchard* [1931] 2 KB 21 at p 43:

- A It ought to be the rule and we are glad to think it is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily, and they can discharge it only by pointing something in the context which goes to show that the loose and inexact meaning is to be preferred.
- B To the above we wish to add that for the words 'in a statute' to be construed effectively reference must be made to their context.
- The amended s. 28A(2)(c) states that:
- C in awarding damages for loss of future earnings the Court shall take into account:
- (i) ... and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured.
- D The question that emerges is whether this amendment forbids award for loss of earning capacity in this case.
- Under the common law and pre-1984 statutory law, there was a difference in law between the loss of earnings and loss of earning capacity. This is explained by Lord Denning in *Fairley v. John Thompson Ltd* [1973] 2 Lloyd's Rep 40 at p 42:
- E It is important to realise that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence.
- F Compensation for diminution in earning capacity is awarded as part of general damages.
- To illustrate, Lord Denning said 'a manual worker may be incapacitated for manual work, but after the accident he may learn a clerical trade. At his new trade he may actually earn more than he would have done before.' (See the Federal Court decision in *Tay Tong Chew & Anor v. Abdul Rahman bin Haji Ahmad* [1985] 1 MLJ 50; *Ti Huck & Anor v. Mohamed Yusof* [1973] 2 MLJ 62; *Ngooi Ku Siong v. Aidi Abdullah* [1985] 1 MLJ 30; all these cases are pre-amendment cases.)
- G It may be argued that such distinction is subtle and is only applicable for legal purposes of assessing an award for damages. However, where the award itself is unauthorised by statutory law, its distinction is of no consequence. For practical purposes, it is immaterial whether damages is termed as 'loss of earnings' or 'loss of earning capacity'. Be that as it may, for the purpose of the decision in this case, we do not wish to dwell more on the traditional heads of damages loss of earnings and loss of earning capacity.
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The cardinal issue for us to decide is did the 1984 amendments oust the discretion and powers and past practices of the court based primarily on common law. If we hold that the amendments clearly superceded the common law and previous statutory law, then the plaintiff is not entitled to any compensation either for loss of earnings or earning capacity as he was not earning anything at the material time of the accident.

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It would be the function of this court to interpret the statutes where there is a lacuna or an area of ambiguity. We need only interpret the law if the intention of the legislature is not clear. This time honoured judicial trend has never been questioned by any authority and therefore before we exercise our power to interpret we must be convinced that the words to be interpreted are loose or inexact. As the point raised is of vital importance in future cases, we have given considerable attention to this point to do justice to the parties.

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In the process of inquiry we came across some decisions touching on reception of English law locally. In a Privy Council decision in the case of *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* [1916] 2 AC 575, Lord Shaw stated 'the the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction is varied or denied effect.' If such was the attitude then, the same principles should be more rigidly applicable now in view of the sovereignty and the abolition of appeals to the Privy Council. In another Privy Council case *Jamil bin Harun v. Yang Kamsiah & Anor* [1984] 1 MLJ 217, it was held:

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(1) It is for the courts in Malaysia to decide, subject always to the statute law of the Federation, whether to follow English law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so.

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We hasten to add that we are conscious that there are two schools of thought relating to statutory interpretation. Lord Denning favoured a creative role for judges, taking on themselves the task of ascertaining the purpose of an act and the ironing out of creases which may appear. Lord Denning has observed in *Seaford Court Estates Ltd v. Asher* [1949] 2 KB 481 at p 499 that:

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it would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set out to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but also from a consideration of the social conditions which give rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.

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- A The other school, notably Lord Simonds, did not share Lord Denning's approach and argued against such a creative role preferring to leave all aspects of the legislative function to Parliament, 'if a gap is disclosed, the remedy lies in an amending Act (*Magor & St Mellons RDC v. Newport Corp* [1952] AC 189).
- B In the same case Lord Morton of Henryton remarked that:
In so far as the intention of Parliament or of ministers is revealed in Acts of Parliament or Orders, either by the language used or by necessary implication, the courts should, of course, carry these intentions out; but it is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the Legislature.
- C While we respect both schools, we do not really have to prefer any of these opinions. We also need not dwell much on various rules and aids to construction of statutes except to say, in general, that we have always been inclined to follow purposive and literal constructions which means that the literal meaning of an Act will be followed where that meaning is in accordance with the legislative purpose. (See the decision in *United Hokkien Cemeteries Penang v. Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121; *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35; *Vengadasalam v. Khor Soon Weng & Ors* [1985] 2 MLJ 449.
- E For the purpose of the present case, let us examine whether the meaning of the words in the relevant amended Act is very clear whatever canons of construction we apply.
The marginal note to s. 28A which reads 'Damages in respect of personal injuries' suggests that the provisions are exhaustive and mandatory. The word 'shall' in the opening sentence in para (c) and the words 'shall not be awarded' in sub-para (i) of para (c) and the words 'shall not take into account' in sub-para (ii) of para (c) in sub-s (2) of s. 28A clearly indicate that it is an essential prerequisite that in awarding damages for loss of future earnings or loss of earning capacity there must be proof that the claimant was receiving earnings by his own labour or other gainful activity before he was injured. Even in a case where the plaintiff was receiving earnings before he was injured, the provisions make it clear that a court shall not take into account any prospect of such earnings being increased at some time in the future.
- G The other argument presented before us for the respondent in this appeal is that the Act did not intend to deprive the claimant of the loss of earning capacity. We feel that such an interpretation is not supported at all by the language of s. 28A itself. We reiterate that s. 28A(2)(c)(ii) which states that 'only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take into account any prospect of earnings aforesaid being increased at some time in the future', makes the intention of the legislature abundantly clear and indeed the legislature had the prospect of future earnings (whatever be the label attached to it) in mind when the law was enacted.
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We need not rely on English authorities to decide this case. In our view much significance must be attached to the fact that our amending Act is not in *pari materia* with English legislation. More importantly our legislature has clearly exercised its own sovereign and independent mind in effecting the amendments to suit economy and special conditions unique to us.

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It is abundantly clear that the legislature, in its own wisdom, decided that an injured person ought not to get any damages in a claim either for loss of future earnings or loss of earning capacity unless before the accident (at the date of accident) he was in fact receiving earnings. To hold otherwise would mean that the court is creating law to provide for something which clearly the legislature has no intention to do. We feel that our legislature has enacted exhaustively and exclusively. The continued validity of the common law concept governing the future earnings of injured people in contrast to amended provisions in accident cases such as the present are inconsistent with each other and cannot co-exist.

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The common law notions and our legislative amendments regarding future earnings are so repugnant to each other that a repeal of common law is implied. Sections 3 and 5 of the Civil Law Act 1956 states, among other things, that in West Malaysia common law as administered in England as on 7 April 1956, is only applicable to any other written law, in which category the 1984 amendment falls.

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It is to be observed that in the case of *Yang Yap Fong & Anor v. Leong Pek Hoon & Anor* [1987] 1 CLJ 377, the Supreme Court in 1987 had granted compensation for loss of earning capacity to a 13-year old plaintiff. We feel that the earlier tribunal did not have the opportunity to be addressed the full effect of legislation overlapping existing law. The recent case of *Dirkje Peiternella Halma v. Mohd Noor bin Baharom & Ors* [1990] 3 MLJ 103, which was heard by another panel of this court and awarded the plaintiff a sum of \$200,000 for loss of earning capacity, can be distinguished from the present case because in that case there was evidence that the plaintiff was earning \$1,270 per month before she came to this country for a holiday and was knocked down by a bus. In that case, there was evidence to show that she had suffered a loss of earning capacity.

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In the light of all the above circumstances, we are unable to agree with the decision of the learned judge. We accordingly allow the appeal and vary the judgment, quashing the award for loss of earning capacity for \$67,200 in this case with interest. We also award half costs of this appeal to the appellants. Deposit is refunded.

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[40] Kes *Tan Kim Chuan & Anor v. Chandu Nair* (*supra*) telah dengan jelasnya mentafsirkan s. 28A(2)(c)(i) Akta Undang-Undang 1956 yang gagal dirujuk oleh Mahkamah Agung di dalam kes *Yang Yap Fong v. Leong Pek Hoon & Anor* (*supra*). Malahan, Mahkamah Agung di dalam kes *Tan Kim Chuan & Anor v. Chandu Nair* (*supra*) telah merujuk kes *Dirkje Pieterella Halma v. Mohd Noor*

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- A *Baharom & Ors* [1990] 2 CLJ 167; [1990] 1 CLJ (Rep) 99; [1990] 3 MLJ 103, juga satu keputusan Mahkamah Agung yang membenarkan tuntutan kehilangan keupayaan mencari pendapatan kepada plaintif yang bekerja sebelum mengambil cuti dan datang ke Malaysia.
- B [41] Pada hemat mahkamah ini, kalimat “damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured” adalah jelas tanpa sebarang keraguan. Niat penggubal undang-undang untuk meletakkan pra-syarat sebelum tuntutan ini boleh dibenarkan adalah jelas dan terang. Adalah menjadi fungsi mahkamah untuk mengguna pakai perkataan yang jelas di dalam statut tanpa menambah apa-apa yang bukan dikehendaki oleh Parlimen. Mahkamah ini ingin merujuk kepada kes *Hari Bhadur Ghale v. PP* [2012] 7 CLJ 789; [2012] 6 MLJ 597, di mana Richard Malanjum Hakim Besar Sabah dan Sarawak (sekarang KHN) semasa memberi keputusan mahkamah telah menyatakan secara menyeluruh di ms. 795-796 (CLJ); ms. 603 (MLJ)
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- D penghakiman tersebut mengenai tafsiran peruntukan berkanun:
- In our view, in order to better understand sub-s. (2), it is necessary to revert to some basic principles or canons of statutory interpretation.
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- Firstly, the object of statutory interpretation is to determine what the words of a statutory provision mean. It may be, *inter alia*, either by way of strict literal meaning, ordinary and natural meaning, the golden rule, the purposive approach (mischief rule), the value-based approach or the *ejusdem generis* rule.
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- Secondly, where the words are unambiguous, plain and clear they must be given their natural and ordinary meanings. ‘It is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral’ (see *Public Prosecutor v. Sihabduin bin Hj Salleh & Anor* [1980] 1 LNS 223; [1980] 2 MLJ 273; *Tan Weng Chiang v. Public Prosecutor* [1992] 1 CLJ Rep 324; [1992] 2 MLJ 625). Further, it should be borne in mind the ‘*dictum* that one should not ‘twist and outstretch the language beyond its common usage’ (see *Cheong Seok Leng v. Public Prosecutor* [1988] 1 LNS 39; [1988] 2 MLJ 481 (also [1988] SLR 565)).
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- H [42] Maka, adalah jelas pra-syarat di bawah s. 28A(2)(c) Akta Undang-Undang Sivill 1956 seseorang yang menuntut kehilangan keupayaan mencari pendapatan mestilah mempunyai pendapatan atau setidaknya-tidaknya telah terjamin akan mendapat pendapatan sebelum kemalangan. Oleh itu, mahkamah ini tidak nampak hakim bicara telah terkhilaf dari segi undang-undang dan fakta dalam menolak tuntutan plaintif di bawah kepala ganti rugi
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am ini. Keputusan hakim bicara mengenai penolakan tuntutan kehilangan keupayaan mencari pendapatan adalah selaras dengan undang-undang dan dengan ini dikekalkan.

Penutup

[43] Memandangkan rayuan defendan-defendan dibenarkan sebahagian, mahkamah ini berpendapat kos sebanyak RM3,000 tertakluk kepada 4% alukator adalah munasabah dan kos sebanyak itu dibenarkan kepada defendan-defendan.

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